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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT**
15 **SAN FRANCISCO DIVISION**

16 SUSAN SIMON, individual, on behalf of
17 herself and all others similarly situated,

18 Plaintiff,

19 v.

20 ADZILLA, INC. [NEW MEDIA], a
21 Delaware Corporation; CONDUCTIVE
22 CORPORATION, a Delaware Corporation;
23 CONTINENTAL VISINET
24 BROADBAND, INC., a Delaware
25 Corporation; CORE
26 COMMUNICATIONS, INC., d/b/a
27 CORETEL COMMUNICATIONS, INC., a
28 Delaware Corporation; AND JOHN DOES
1-50, Corporations Defendants,

Defendants.

CASE NO. 3:09-cv-00879-MMC

JOINT CASE MANAGEMENT CONFERENCE
STATEMENT

Initial Case Management Conference:

Judge: Hon. Maxine M. Chesney
Date: June 12, 2009
Time: 10:30 a.m.

1 **JOINT REPORT OF THE PARTIES' PLANNING MEETING AND JOINT CASE**
2 **MANAGEMENT STATEMENT**

3 ■ Pursuant to Fed. R. Civ. P. 26(f), a discovery and case management conference was held
4 on May 21, 2009, and was telephonically attended by:

- 5 ■ Scott A. Kamber and Michael Aschenbrener of KamberEdelson on behalf of
6 Plaintiff;
7 ■ Beatriz Mejia of Cooley Godward Kronish on behalf of Adzilla, Inc. (identified
8 in the complaint as Adzilla [New Media], Inc.);
9 ■ Rocky Unruh of Schiff Hardin on behalf of Core Communications, Inc.

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11 In accordance with this Court's standing order, and Local Rule 16-9, the parties report as
12 follows:

13 **1. Jurisdiction and Service:**

14 All named parties named in the action have been served.

15 Defendant Core Communications, Inc. has filed a motion to dismiss for lack of personal
16 jurisdiction, which is noticed for hearing on July 10, 2009.

17 Defendant Continental VisiNet Broadband, Inc., has filed a motion to dismiss for lack of
18 personal jurisdiction which is scheduled for hearing on July 31, 2009. Plaintiff states that it is
19 likely that an agreement for the dismissal without prejudice of Continental VisiNet will be
20 reached prior to that time.

21 Plaintiff has dismissed Defendant Conducive Corporation without prejudice and subject to
22 a tolling agreement.

23 Defendant Adzilla's response to the Complaint is due June 15, 2009, pursuant to a
24 stipulation entered between Plaintiff and Adzilla.
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1 **2. Facts and Contentions of the Parties:**

2 Defendant Adzilla, Inc. (hereinafter “Adzilla”), was a California-based online advertising
3 company, and was a subsidiary of Defendant Conducive Corporation (hereinafter “Conducive”).

4 Defendant Continental VisiNet Broadband, LLC (hereinafter “Continental”), is an Internet
5 Service Provider (hereinafter “ISP”) registered in Delaware and headquartered in Virginia.

6 Defendant Core Communications, Inc. (hereinafter “Core Communications”), is a Competitive
7 Local Exchange Carrier (hereinafter “CLEC”). Plaintiff is a citizen of Virginia.

8 Plaintiff alleges that Defendants engaged in the interception, copying, transmission,
9 collection, storage, usage, and altering of personal, private data of the class members.

10 Defendant Core alleges that Defendant Core is not a resident of California, and that
11 plaintiff has not alleged and cannot prove any basis for the Court to exercise personal jurisdiction
12 over Core.

13 Defendant Adzilla denies that it engaged in the interception, copying, transmission,
14 collection, storage, usage, or altering of personal, private data of any individual or entity.
15 Defendant Adzilla further states that the alleged “Deep Packet Inspection” products referenced in
16 the Complaint were never activated, and no consumer data was collected, such that Adzilla
17 cannot be held liable for the claims asserted by Plaintiff.

18 **3. Legal Issues:**

19 The parties agree that the issue of whether or not any class may be properly certified
20 under the requirements of Rule 23(b) is one of the primary issues in this case, and that other
21 issues include:
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- Whether the Continental VisiNet, which is not headquartered in the state of California and provides internet services to subscribers in states other than California, can be subject to California law with respect to the conduct complained of in the Complaint (which Plaintiff allege occurred primarily in California);
- Whether the Court can exercise personal jurisdiction over Defendant Core Communications, Inc.;
- Whether plaintiff Simon, a resident of Virginia, has standing to bring claims under California' Invasion of Privacy Act and Computer Crime Law;
- Whether the federal claims in Plaintiff's Complaint can be applied to the Defendants;
- Whether Adzilla and/or Continental VisiNet and Core owed the ISP subscribers a duty to disclose the fact and nature of the DPI, if any, conducted by the Adzilla device with respect to their internet communications;
- Whether consumers consented to DPI, if any, of their internet communications;
- Whether conduct complained of constitutes a violation of the federal Electronic Communications Privacy Act ("ECPA") and the Computer Fraud and Abuse Act ("CFAA"), and state law claims pursuant to the California Invasion of Privacy Act ("CIPA") and California Computer Crime Law ("CCCL"), both as to Adzilla, and separately, as to Continental VisiNet and Core; and
- The appropriate remedies if the conduct alleged in the Complaint supports liability under any of the claims in the Complaint, including the propriety of any monetary and or injunctive relief requested by Plaintiff.

4. Motions:

[see above at Section 1].

1 **5. Amendment of Pleadings:**

2 Plaintiff believes that there exist a number of unidentified ISPs that also implemented the
3 Adzilla Deep-Packet Inspection technology directed to their subscriber base at some time during
4 the Class Period. Plaintiff plans to serve discovery against Adzilla to ascertain the identity of
5 these additional ISP defendants who are presently identified as DOE defendants in the operative
6 complaint. Responsive discovery will likely result in Plaintiff seeking leave to file an amended
7 pleading to name additional parties that may be identified.
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9 **6. Evidence Preservation:**

10 The parties each represent that they are complying in good faith with their obligations to
11 preserve potentially relevant documents. Plaintiff believes that more specific discussions about
12 the scope of document preservation activity, including electronic discovery, record management
13 and destruction practices and any related instructions or correspondence with potential or actual
14 custodians can be deferred until the parties' anticipated meeting regarding this matter.
15 Defendants believe that it is premature to conduct a meeting regarding this preservation matter
16 until the Court has ruled on the pending motions to dismiss.
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18 Defendant Adzilla is complying with its preservation obligations, but notes that it ceased
19 all California business operations in October, 2008, prior to the filing of the Complaint. In
20 connection with the winding down of its operations, Adzilla sold almost all of its assets, including
21 computer equipment, computer servers, and databases. Accordingly, Adzilla possesses only a
22 small number of documents relevant to this dispute.
23

24 **7. Disclosures:**

25 Initial disclosures, per rule Rule 26(a)(1)(C), are due on June 5, 2009. Plaintiff has served
26 initial disclosures. Defendant Core is contesting personal jurisdiction and objects to undertaking
27 its initial disclosure until the Court has ruled on its motion to dismiss. Defendant Adzilla
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1 maintains that a protective order should be agreed to among the parties and entered by the Court
2 prior to the production or exchange of any documents. Adzilla and plaintiff are discussing the
3 possibility of using this Court's form protective order pending further agreement among the
4 parties.

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6 **8. Discovery:**

7 **a. Discovery Taken to Date.** No discovery has yet been served.

8 **b. The Scope of Anticipated Discovery.** The Parties anticipate depositions,
9 interrogatories, document requests, and other fact and expert discovery available under the FRCP
10 and Local Rules.

11 **c. Proposed Limitations or Modifications to the Discovery Rules.** At the present
12 time, the Parties do not anticipate limitations or modifications to the discovery rules.

13 **d. Proposed Discovery Plan Pursuant to Fed. R. Civ. P. 26(f).** The Parties have
14 not yet agreed on the general parameters of a discovery plan, as the outcome of any motions to
15 dismiss may alter the scope of these proceedings.

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17 **9. Class Actions:**

18 Plaintiff provides the following class action information pursuant to L.R. 16-9(b):

19 **a.** This action is maintainable as a class action under Fed. R. Civ. P. 23(a) and (b)(1)
20 (b)(2) and (b)(3).

21 **b.** The action is brought on behalf of the following Class initially defined as:

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23 A) All AAISP Subscribers whose internet communications were monitored,
24 intercepted, accessed, copied, transmitted, altered and/or used at any time by
25 or through an Adzilla device.

26 and:
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1 B) All AACLEC end-users whose internet communications were monitored,
2 intercepted, accessed, copied, transmitted, altered and/or used at any time by
3 or through an Adzilla device.

4 Additionally and/or alternatively, Plaintiff bring this Complaint on behalf of herself
5 and the following subclasses:

6 i) All Core Communications, Inc. end-users whose internet communications
7 were monitored, intercepted, accessed, copied, transmitted, altered and/or used
8 at any time by or through an Adzilla device.

9 ii) All Continental VisiNet Broadband, Inc, subscribers whose internet
10 communications were monitored, intercepted, accessed, copied, transmitted,
11 altered and/or used at any time by or through an Adzilla device.

12 iii) All Doe AACLEC end-users whose internet communications were
13 monitored, intercepted, accessed, copied, transmitted, altered and/or used at
14 any time by or through an Adzilla device.

15 iv) All Doe AAISP subscribers whose internet communications were
16 monitored, intercepted, accessed, copied, transmitted, altered and/or used
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19 ■ at any time by or through an Adzilla device.

20 c. The following facts alleged in the Complaint demonstrate that this action is
21 maintainable as a class action under Fed. R. Civ. P. 23(a) and (b):

22 **Numerosity** – While the precise number of Class members is unknown to Plaintiff at this
23 time, Plaintiff estimates that the Class consists of tens of thousands of members.

24 **Common Questions** – There are numerous common questions of fact and law. The
25 principal factual issues in dispute (Section 2 above) and points of law (Section 3 above) are
26 common to all Class members, and predominate over any questions affecting Plaintiff or other
27 individual members of the Class.
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1 **Typicality** – Plaintiff’s claims are typical of those of the Class. Plaintiff and all Class
2 members were subscribers of ISPs at the times in which and in the locations in which
3 Continental VisiNet and/or Core activated the Adzilla device that intercepted their internet
4 communications.

5 **Adequacy** – Plaintiff has no interests adverse or antagonistic to those of the Class and
6 have retained competent and experienced class counsel to prosecute the action.
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8 **Superiority** – A class action is superior to all other available methods for the fair and
9 efficient adjudication of this controversy because joinder of all members is impracticable.
10 Furthermore, as the damages suffered by individual Class members may be relatively small, the
11 expense and burden of individual litigation makes it impossible for members of the Class to
12 individually redress the wrongs done to them. There will be no difficulty in the management of
13 this case as a class action.
14

15 Additionally, the Class may be certified because:

- 16 • the prosecution of separate actions by the individual members of the Class would
17 create a risk of inconsistent or varying adjudication with respect to individual Class
18 members which would establish incompatible standards of conduct for Adzilla,
19 Continental VisiNet, and Core;
- 20 • the prosecution of separate actions by individual Class members would create a
21 risk of adjudications with respect to them that would, as a practical matter, be dispositive
22 of the interests of other Class members not parties to the adjudications, or substantially
23 impair or impede their ability to protect their interests; and
- 24 • Adzilla, Continental VisiNet, and Core have acted or refused to act on grounds
25 generally applicable to the Class, thereby making appropriate final and injunctive relief
26 with respect to the members of the Class as a whole.
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1 **d.** Barring substantial delays caused by discovery disputes Plaintiff anticipates
2 bringing their motion for class certification 120 days after the close of discovery.

3 Defendants contend that class certification is not appropriate for multiple reasons,
4 including without limitation:

5 **a.** The statutory damages sought by the class are disproportionate to any possible
6 harm suffered, especially in light of the fact that no consumer data was ever collected, accessed,
7 or maintained by defendants.

8 **b.** The proposed class members are citizens of states other than California and lack
9 standing to maintain the claims alleged in the Complaint.

10 **c.** Injunctive relief is not an available or necessary remedy here in light of the
11 cessation of Adzilla's business operations.

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14 **10. Related Cases:**

15 There are no known related cases. Core's motion to relate this case to *Valentine v.*
16 *NebuAd*, No. 08-cv-5113, pending before Judge Henderson in the Northern District of California,
17 was denied.

1 **11. Relief:**

2 Plaintiff seeks:

- 3 • An order certifying the Class, directing that this case proceed as a class action, and
- 4 appointing Plaintiff and her counsel to represent Plaintiff and the Class;
- 5 • Judgment in favor of Plaintiff enjoining Defendants from engaging in DPI
- 6 inspection of their subscribers internet communications;
- 7 • Judgment in favor of Plaintiff requiring Defendants to cleanse all systems of all
- 8 data obtained through the Adzilla device and enjoin any party or third party from any
- 9 use of said data;
- 10 • Judgment in favor of Plaintiff and Class members in an amount of actual damages,
- 11 compensatory damages, or restitution to be determined at trial;
- 12 • Judgment in favor of Plaintiff and Class members for statutory damages in an
- 13 amount to be determined at trial;
- 14 • An order granting reasonable attorneys' fees and costs, as well as pre- and post-
- 15 judgment interest at the maximum legal rate; and
- 16 • Such other and further relief as this Court may deem appropriate.
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20 Defendants deny that any such relief is appropriate, due, either entirely or in part, to the

21 fact that no consumer data was ever collected or accessed and Plaintiff and the putative class

22 members have suffered no cognizable injury.

23 **12. Settlement and ADR:**

24 The parties could not agree on a method of ADR and are participating in a Court

25 conference on ADR on June 8, 2009.

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27 **13. Consent to Magistrate Judge For All Purposes:**

28 The parties do not consent to have a magistrate judge conduct all further proceedings.

1 **14. Other References:**

2 At this time, the Parties not believe this case is suitable for reference to binding
3 arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

4 **15. Narrowing of Issues:**

5 The parties do not believe that the issues can be narrowed at this time. After a ruling on
6 the anticipated motion to dismiss and appropriate discovery the parties are willing to further meet
7 and confer regarding whether any narrowing of the factual or legal issues, including issues related
8 to class certification, can be achieved by way of voluntary agreement.

9 **16. Expedited Schedule:**

10 The parties do not believe this case should be expedited at this point.

11 **17. Scheduling:**

12 No discovery has been taken by or against defendants to date.

13 **18. Trial:**

14 Plaintiff has demanded a jury trial and estimates that a trial would take 10 days. The
15 defendants believe that it is premature to estimate the length of trial and that it is premature to
16 schedule a trial date until the Court rules on any motions to dismiss and whether the class should
17 be certified. After the Court has ruled on certification, the parties will reconvene and jointly
18 submit a proposed trial date and estimated trial length.
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1 **19. Disclosure of Non-party Interested Entities or Persons:**

2 Continental VisiNet has filed their respective “Certification of Interested Entities or
3 Persons,” and Adzilla will be filing its certification shortly. Plaintiff did not disclose any persons
4 or entities other than Plaintiff and Defendant.
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8 Dated: June 5, 2009 By: /s/
9 Alan Himmelfarb
KAMBEREDELSON, LLC
Attorney for Plaintiff

10
11 Dated: June 5, 2009 By: /s/
12 Beatriz Mejia
COOLEY GODWARD KRONISH LLP
Attorney for Adzilla, Inc.

13
14 Dated: June 5, 2009 By: /s/
15 Rocky N. Unruh
SCHIFF HARDIN LLP
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